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SERVICE DATE - AUGUST 14, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-406 (Sub-No. 13X)

CENTRAL KANSAS RAILWAY, L.L.C. – ABANDONMENT EXEMPTION – IN RENO,
KINGMAN, HARPER, RICE AND MCPHERSON COUNTIES, KS

Decided: August 9, 2001

We are denying two requests for relief filed by two parties in this proceeding. One petitioner moved to reject a notice of exemption served and published on December 20, 2000. The second requested the preparation of further environmental studies. Both protested the notice of exemption.

BACKGROUND

On November 30, 2000, Central Kansas Railway, L.L.C. (CKR), filed a notice of exemption under 49 CFR 1152 Subpart F – Exempt Abandonments to abandon: (1) its H&S Branch between: (a) milepost 3.6 at Hutchinson and milepost 31.1 at Kingman; and (b) milepost 48.2 at Rago and milepost 59.7 at Harper; and (2) its McPherson Branch between milepost 58.0 at Conway and milepost 77.4 at Lyons, a distance of approximately 58.4 miles in Reno, Kingman, Harper, McPherson, and Rice Counties, KS.¹ The exemption became effective on January 19, 2001, which was the date that CKR had proposed to consummate the transaction.

On December 28, 2000, the Kansas Rail Users Association (KRUA)² tendered a protest to the abandonment and a motion to reject CKR's notice of exemption. On January 16, 2001,

¹ Notice of the exemption was served and published in the Federal Register on December 20, 2000 (65 FR 79917). By decision of the Director of the Office of Proceedings, served on January 18, 2001 (January 18 decision), environmental conditions and a public use condition were imposed on the proposed abandonment.

² KRUA is located in Wichita, KS, and is an association of individuals who seek to preserve rail service. Charles Swayze, the General Manager of the Farmers Cooperative Equity Company (FCEC), with grain facilities at Isabel, Nashville, Sawyer, Zenda, Medicine Lodge, and Lake City, KS, serves as KRUA's chairman.

BAMCO³ submitted a protest and a request for the preparation of further environmental studies,⁴ and on January 18, 2001, BAMCO tendered a protest to the abandonment.⁵ Neither party requested a stay of effectiveness of the notice of the exemption and neither party protested CKR's abandonment of its McPherson Branch line between Conway and Lyons.⁶ CKR replied to each of the pleadings.

Procedural Issues. On January 26, 2001, KRUA filed a petition to vacate the Director's January 18 decision on the grounds that it failed to consider KRUA's protest filed on December 28, and KRUA requested that the record be "reopened to receive evidence from other sources." CKR did not reply. The petition to vacate will be denied. The January 18 decision is not a decision by the Board on the merits of the abandonment exemption, but a decision by the Director of the Office of Proceeding imposing conditions on the exemption. Accordingly, there was no need for the decision to reference KRUA's December 28 protest. We are now considering on the merits the protest and other pleadings filed by KRUA and BAMCO in opposition to the notice of exemption. KRUA's request to reopen the record will also be denied. KRUA has not identified what "other sources" might submit additional evidence in this proceeding, the nature of that evidence or how it might supplement the evidence already submitted by KRUA and BAMCO in their pleadings, or why it would warrant reopening of the record.

³ BAMCO states that it is a family-run business located in Ft. Worth, TX, and that it represents landowners at Protection and Coldwater in Comanche County, KS, who are shareholders in the Comanche County Co-op, which, according to BAMCO, shipped grain via rail until CKR's purchase of its lines in Kansas. BAMCO's pleadings were submitted by Merle D. Wait, who apparently is a landowner in the State of Kansas and owns shares in elevators served by CKR. Mr. Wait is neither an attorney nor a practitioner before the Board. Accordingly, Mr. Wait cannot represent the interests of others besides himself and his company.

⁴ This pleading appears to be a comment on the Environmental Assessment (EA) prepared for the proposed abandonment and served on December 22, 2000. Although the comment was submitted late, we will consider it.

⁵ KRUA's and BAMCO's pleadings will be accepted as petitions to reject and/or revoke the exemption. Although BAMCO's January 16 pleading was filed after the January 9, 2001 date for filing petitions to reopen, CKR has replied and will not be prejudiced by our consideration of the late-tendered pleading. Therefore, we accept both BAMCO's pleading and CKR's reply.

⁶ KRUA states that its protest is limited to the line between Rago and Harper. BAMCO states that its protest is limited to the line between Hutchinson and Kingman and the line between Rago and Harper.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 U.S.C. 10502, we have exempted “out-of-service” rail lines from the regular procedures for obtaining permission for abandonment of a rail line under 49 U.S.C. 10903. In their place we have adopted the abbreviated procedures set forth in 49 CFR 1152.50 for abandonment of a rail line where the carrier certifies that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic can be rerouted over other lines; and (3) no formal complaint has been filed by or been decided in favor of a user of rail service on the line (or by a state or local government entity acting on its behalf) regarding cessation of service over the line or is pending with the Board or with any U.S. District Court within the 2-year period.⁷ If the carrier’s notice of exemption contains false or misleading information regarding these factors, however, the carrier’s attempt to use the class exemption is void ab initio and the Board will reject the notice. 49 CFR 1152.50(d)(3). Moreover, under 49 U.S.C. 10502(d), we may revoke the exemption (in whole or as it applies to a particular line) if we find that regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns. CSX Transp., Inc., – Aban. – In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992).

Rejection. In its notice of exemption, CKR made the required certifications, including a statement that no local or overhead traffic has moved over the lines within the last 2 years and that, also during that time, no formal complaint was filed by a user of rail service over the lines. Neither of the protesting parties alleges that CKR’s notice of exemption contains false information. Petitioners do not rebut CKR’s certification that no complaint concerning service over the line has been filed within the past 2 years or is pending.⁸ Rather, BAMCO argues that CKR’s actions forced the abandonments, and KRUA claims that CKR did not intend to serve the Harper-Rago line, and, therefore, that its use of the class exemption is inappropriate. In support, petitioners allege that CKR imposed unreasonable surcharges on traffic that would use the line, failed to provide adequate equipment, removed or paved over tracks without authority, and stored cars on the Rago-Harper line.

Based on our analysis of the record, we find that CKR has satisfactorily addressed the petitioners’ allegations and conclude that CKR’s cessation of service was the result of the

⁷ In addition to these certifications, the carrier must provide other information in the notice, including a proposed consummation date.

⁸ BAMCO asserts that complaints have been made in letters to the editor and legislature, phone calls to the CKR, and visits to the Board. These, however, do not qualify as formal complaints under 49 CFR 1152.50(b), which are complaints filed with the Board or a U.S. District Court or complaints decided in favor of the complainant by those bodies within the last 2 years.

voluntary decision by shippers to stop using rail service over these lines and not due to any untoward action by CKR. Regarding the surcharge claim, CKR states that the surcharge was imposed for financially justified reasons, and that, in any event, the surcharge was canceled on June 1, 1998, and no shipper was ever charged the surcharge.

Concerning the supply of hopper cars, CKR has only 290 cars in its fleet, which are used for local traffic. Most of the cars supplied to shippers come from Class I railroads, Union Pacific Railroad Company (UP) and The Burlington Northern and Santa Fe Railway Company (BNSF). Moreover, CKR maintains that no shipper on the Rago line has requested rail service since 1993. And there has also been no overhead traffic on this line since 1993. Thus, there does not appear to have been a failure by CKR to provide adequate equipment.

Regarding the paving over or removal of tracks, CKR explains that the Rago crossing that was paved over is located north of the Rago-Harper line. CKR adds that it removed a track that connected to a BNSF line that had been abandoned, because the connection did not lead anywhere and its removal did not affect service to an elevator at Rago. CKR also responds that, in September 2000, after it had given notice of its intent to file the notice of exemption to various governmental entities, the State asked CKR to remove track at a road crossing near the Rago elevator. CKR states that it removed the track because no traffic had moved from the elevator in more than 2 years, the general manager of the elevator had told CKR that it did not intend to use it again, and the State agreed to replace the track if the shipper requested service.

BAMCO alleges that crossings were paved over on the Kingman-Hutchinson line. But, according to CKR, BNSF retained ownership over the northern portion of the line and gave permission to the State, without consulting with CKR, to pave over a crossing. CKR states that, because no traffic originated on the line and CKR had an alternative overhead route, CKR's operations were not affected by the crossing removal. Later, at the request of the State, CKR paved over a crossing at the southern end of the Kingman-Hutchinson line. This was done, according to CKR, on the condition that, if a shipper requested service, the crossing would be restored.⁹ Thus, CKR has satisfactorily explained the allegations of removal or paving over of certain tracks.

Concerning stored cars, as noted, CKR states that no shipper on the Rago-Harper line has requested service since 1993. Moreover, CKR points out that, if a service request had been made, it would have moved the cars, and, in any event, no car has been stored on the line since 1997.

⁹ KRUA argues that the paving over of track is a violation of 49 U.S.C. 11101(a), which requires providing transportation or service on reasonable request, citing Overbrook Farmers Union – Petition for Declar. Order, 5 I.C.C.2d 316 (1989) (Overbrook). We find that this proceeding is distinguishable, because unlike the situation in Overbrook, CKR did not embargo the line, and, no shipper has requested service over the Rago line since 1993.

As for other issues raised, BAMCO alleges that cars destined for Hutchinson from any lines served by the CKR have to be diverted to Wichita, thereby adding costs. CKR explains, however, that, while more circuitous, the routing through Wichita is actually faster than that via the Kingman-Hutchinson line because of faster track speed.¹⁰

BAMCO also contends that if the Rago-Harper line is abandoned, shippers will lose access to Class I carriers. It argues that CKR has opted not to access BNSF at Harper, but instead routes cars from Protection to Rago, Rago to Kingman, and Kingman to Wichita. BAMCO submits that cars could be handled more efficiently via Rago-Harper. According to CKR, however, shippers will still have a single line connection to Wichita, where their shipments can be interchanged with either BNSF or UP. CKR also states that BNSF is the only Class I carrier with which it could interchange at Harper, and that it is unlikely that an interchange agreement could be reached because the BNSF route through Harper is a high speed transcontinental line. Finally, no overhead traffic is being rerouted from this line, because, as noted, there has been no overhead traffic on the line since 1993.

In summary, as reflected by the evidence of record, neither petitioner has shown that CKR's notice of exemption contains false or misleading information, and CKR has correctly made the required certification to invoke the class exemption. And the petitioners have not demonstrated that the exemption should otherwise be rejected. Accordingly, the lines qualified for use of the class exemption for their abandonment, and the notice of exemption was properly published.

Revocation. Under 49 U.S.C. 10502(d), revocation of an exemption is appropriate if regulation is necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101. While neither party specifically urges us to revoke the exemption as it applies to CKR's H&S Branch lines, BAMCO argues that abandonment of the questioned lines would adversely affect shippers and local communities. Given the fact that shippers have not used these lines for at least 2 years and have used alternative motor carrier service in the area, there is nothing in the record to support the contention that these abandonments would be economically harmful. We conclude that neither BAMCO nor KRUA has shown that retention of these lines, or further regulation for any other purpose, is necessary to carry out the rail transportation policy. Therefore, we will not revoke the exemption.

Environmental Issues. BAMCO requests that we undertake further environmental studies and prepare an "environmental impact study." The petitioner submits data that allegedly show the harmful environmental effects when rail traffic is shifted to trucks. The Board's

¹⁰ Neither BAMCO nor KRUA disputes CKR's certification that any traffic from CKR's active lines can be rerouted. We have not required a carrier to forgo the abandonment of a line that generates no traffic simply to protect the interests of shippers moving overhead traffic that can be efficiently rerouted over another of the carrier's lines. See Exemption, 2 I.C.C.2d at 150.

environmental rules at 49 CFR 1105.6 (a) – (d) set forth the criteria that identify those types of actions for which an environmental impact statement (EIS) or an EA is prepared, or for which no environmental review is necessary. Railroad abandonments, like the action proposed here, are classified under the Board's regulations as normally requiring preparation of an EA. The Board's Section of Environmental Assessment (SEA) reviewed the proposed abandonment and issued an EA on December 22, 2000, recommending that conditions be imposed that address salvage concerns and concluding that an EIS was unnecessary. Because the lines are no longer in operation, there are no rail-to-truck diversions to cause possible adverse environmental effects.¹¹ BAMCO raises no allegations of significant environmental harm due to CKR's proposed abandonment here. Therefore, BAMCO has not shown a need for us to undertake further environmental analysis in this proceeding, and its request will be denied.

CKR submitted a letter on May 25, 2001, requesting removal of the 6 environmental conditions imposed in the January 18 decision. CKR asserts that it has complied with the conditions imposed by that decision, attaching letters in support. Based on this information, SEA recommends that the environmental conditions be removed. The recommendation will be adopted. Accordingly, the proceeding will be reopened and the 6 previously imposed conditions will be removed.

Notice. BAMCO states that CKR did not place notification of the abandonment in any local paper in Comanche County. Under 49 CFR 1105.7(c), "applicant shall certify that it has published in a newspaper of general circulation in each county through which the line passes a notice that alerts the public to the proposed abandonment." The abandonment includes lines that pass through Reno, Kingman, Harper, McPherson, and Rice Counties but not Comanche County. Therefore, CKR was not required to file a notice of abandonment in Comanche County. BAMCO also alleges that the Harper County Commissioners are not aware of having been contacted for comment on the proposed abandonment. However, in its notice of exemption, CKR has certified that it served a copy of its environmental report on the Harper County Commission on November 7, 2000. Without persuasive evidence to the contrary, we find CKR's certification to be dispositive of the issue.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

¹¹ BAMCO's allegations pertain to the cumulative effects of railroad abandonments generally on the state's highways and to the safety of the traveling public. SEA, with the assistance of the Kansas Departments of Environment and Transportation, reviewed the impact on air quality and safety of 199 abandonments in Kansas between 1986 and 2001 and found no adverse effects resulting from rail abandonments. Although these findings do not pertain to the specific line proposed for abandonment in this proceeding, a copy of SEA's conclusions has been made a part of the public record in this proceeding.

It is ordered:

1. The proceeding is reopened, and the 6 environmental conditions imposed in the January 18 decision are removed.
2. BAMCO's late-tendered protests and request for further environmental review are accepted for filing; CKR's reply to these pleadings is also accepted.
3. KRUA's and BAMCO's petitions to reject and/or revoke the notice of exemption are denied.
4. BAMCO's request for further environmental review is denied.
5. KRUA's petition to vacate the Director's January 18, 2001 decision and to reopen the record is denied.
6. This decision is effective September 8, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary